Supreme Court, U.S.
FILED
113 D
08-739 DEC 5 - 2008
OFFICE OF THE CLERK

No. 08-___

IN THE

Supreme Court of the United States

MALCOLM E. MCVAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should summarily reverse the decision below, on the grounds that the Court of Appeals committed the same error that this Court identified in *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586 (2007): the error of substituting its own subjective sentencing judgment for the experience-based judgment of the District Court.

2. What (if any) empirically- or legally-derived basis must a federal appellate court have, beyond its own intuition that the sentence should be more or less severe, before the court can reverse a sentence as substantively unreasonable under *Gall*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Malcolm E. McVay respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit, dated September 19, 2008, in *United States v. McVay* (11th Cir. No. 07-11264).

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix at 1a-3a. The Court designated the decision as "unpublished," but it is available at 2008 U.S. App. LEXIS 20820 and at <http://www.ca11.uscourts.gov/unpub/ops/200711264.pdf>. The transcript of the sentencing, in the United States District Court for the Northern District of Alabama, is reproduced in the appendix at 4a-33a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit's decision issued on September 19, 2008.

STATEMENT OF THE CASE

Petitioner Malcolm "Tadd" McVay was a short-term participant in a large-scale accounting fraud conspiracy at HealthSouth Corporation. He pleaded guilty to a federal information. And in order to make up for his offenses, McVay assisted the Government in its HealthSouth investigation and prosecutions, in ways that were indisputably extraordinary.

Two United States District Judges have agreed on the appropriate sentence for Mr. McVay: six months of home detention, five years of probation, a fine and forfeiture. Yet the Court of Appeals has substituted its own judgment for that of the two District Judges. And the Court of Appeals has done so without any support, either in fact or in law, beyond its own bare intuition that the sentence chosen by the two District Judges is inadequate under 18 U.S.C. § 3553.

A. The facts.

The accounting conspiracy at HealthSouth was a large and lengthy one. It spanned at least nine years, involved many participants, and included overstatement of corporate earnings by billions of dollars. *U.S. v. Martin*, 455 F.3d 1227, 1230 (11th Cir. 2006).

McVay's involvement, however, was much shorter and narrower than the conspiracy as a whole. That was the finding of the District Court. The prosecution did not object to it, and the Court of Appeals did not claim that the finding was erroneous. This was

the extent of McVay's offense conduct: Having just recently been made Chief Financial Officer of HealthSouth, McVay signed the form 10-Q (a financial statement) for the third quarter of 2002. He did this, although he knew that the material on that form was incorrect in certain respects based on irregularities in the numbers from prior quarters.

As the District Court found, he "had been in his position as CFO less than 1 month when he was presented with a document to sign which he had learned contained false information." [25a]. "There is no dispute from anybody that the defendant did not know about it [i.e, accounting fraud] until he was told as CFO to sign the quarterly report, and he did not know about it until Mr. Harris told him about it right after he became CFO." [26a].

The District Court's findings of fact continued:

> More specifically I find, however, that it was the attachments to the document, not the document that he had helped prepare, which contained the false information. He had no knowledge of the amount of misstated funds but was advised not only by Emery Harris to sign the document, but by Mr. Scrushy as well.
>
> Actually, if I understand completely correctly what was said in the plea transcript, he talked to Mr. Harris about it at the time he was about to sign the document when Mr. Harris told him that the attachments contained some false figures, and he talked to Mr. Scrushy afterwards about it.
>
> This one act, the signing of the quarterly report, comprised the whole of his involvement in this lengthy and broad conspiracy. He was not a

> member of the family that we have heard so much about and has never founded and prolonged the fraud, nor did he attend the family meetings. Not many months after signing the one and only document, the defendant was removed from his position as CFO and at no time did he direct anyone in furtherance of this conspiracy.

[25a].

The District Court also noted, and relied on, evidence that McVay was in fact very careful not to generate fraudulent financial data himself or to allow those working under him to do so. Thus McVay, during his short tenure as HealthSouth's CFO, was fighting back against the corruption in the company. He "stood firm" even against any efforts to "push the envelope" with respect to financial accounting; and (unlike his predecessors as CFO) he actively protected those under him when they received pressure from higher-ups to engage in questionable accounting. [27a].

In contrast to the ultra-limited nature of his offense conduct, McVay's assistance to the Government has undisputedly been exemplary and extraordinary. In its original motion for a downward departure under Guidelines § 5K1.1, the Government stated as follows:

> The defendant has provided substantial assistance in the investigation and prosecution of persons who perpetrated the massive accounting fraud at HealthSouth.
>
> From the discovery of the defendant's participation in the conspiracy, the defendant has truthfully and completely confessed his misdeeds. The

defendant has also revealed, without hesitation, what he knows about the participation of others in the scheme.

...

The defendant has been available on a continuous and regular basis and met whenever needed, with representatives of the United States, HealthSouth, and the forensic auditor reconstructing HealthSouth's books and records. The defendant has provided invaluable assistance in helping the United States, HealthSouth, and the forensic auditor discover, in an expeditious manner, the varied ways in which the fraud was conducted. As part of the defendant's assistance to the United States, he has spent many hours reviewing financial statements and numerous other documents.

Specifically, the defendant has helped explain specific transactions, and has provided information implicating several other culpable individuals. Defendant has provided both general and specific information which has been of assistance to the investigation. The general information has included information on HealthSouth's relationships with Wall Street analysts and banking institutions. Defendant has also assisted the United States by detailing parts of publicly filed financial statements that contained materially false information. Further, the specific information has included evidence of direct conversations with those that directed the fraud about topics such as possible methods for dealing with, continuing, and covering up the fraudulent scheme. The defendant's assistance has facilitated both the securing of guilty pleas from other co-con-

> spirators and the prosecution of other individuals yet to be convicted. Information provided by the defendant has also corroborated information by other individuals who have independently assisted the investigation. The information provided by the defendant, to the best of the government's knowledge, has been truthful and accurate.
>
> The defendant's immediate cooperation has allowed the HealthSouth case to be prosecuted at a pace which, on a relative basis, constitutes swift and efficient of the United States' criminal laws. Further, the details of the fraudulent scheme were exposed to the public shortly after the discovery of the fraud due, in part, to the defendant's cooperation. Such actions by the United States helped reassure the nation's financial markets in the wake of the scandal and has contributed to HealthSouth's ability to begin its recovery.

Even after his original sentencing, Mr. McVay continued to assist the Government tremendously. In the Government's own words, he:

> remain[ed] available on a continuous and regular basis and met whenever needed with various agencies of the United States, including the FBI and the Securities and Exchange Commission, each of which had a substantial need for his assistance.
>
> In addition, the defendant met with prosecutors on at least ten occasions during December 2004, and January and February 2005, in extensive preparation for his testimony at the trial of the former CEO of HealthSouth; each of these occa-

> sions lasted approximately three to four hours. The defendant also spent substantial time reviewing financial documents on each of four or five other occasions. In March 2005, the defendant testified for two days on behalf of the government at the criminal trial of the former CEO of HealthSouth. The information defendant provided to the government as well as his testimony at trial, to the best of the government's knowledge and belief, have been truthful and accurate.

The District Court accepted and relied upon the Government's glowing description of Mr. McVay's assistance. [21a].

Furthermore, the District Court heard – and quite obviously took into account – a heartfelt apology and allocution from Mr. McVay himself. [14a-15a].

B. The course of proceedings below.

Mr. McVay pleaded guilty to an information in 2003. Because he substantially assisted the Government in its investigation and prosecutions of other HealthSouth officials, as noted above, the Government filed a motion for downward departure under U.S.S.G. § 5K1.1. *U.S. v. McVay*, 447 F.3d 1348, 1350-51 (11th Cir. 2006) ("*McVay I*").

The first sentencing took place before this Court decided *United States v. Booker*, 543 U.S. 220 (2005) (holding Sentencing Guidelines to be advisory only). The District Court granted the Government's § 5K1.1 motion, and sentenced Mr. McVay to six months' home detention with electronic monitoring, a fine of $10,000, forfeiture of $50,000, and probation for five years.

On the Government's appeal, the Court of Appeals vacated the sentence and remanded for resentencing. *McVay I*, *supra*. The Court held that the District Court had taken account of things that it should not have taken account of, under § 5K1.1; and the Court also held that further explanation was required for the extent of the § 5K1.1 departure. *McVay I*, 447 F.3d at 1355-56.

The second sentencing took place after *Booker*, before a different District Judge (Johnson, J.). The Government renewed and supplemented its motion for downward departure under § 5K1.1.

Judge Johnson began with an advisory Guidelines level of 29 [6a], as the Court of Appeals recognized was appropriate in *McVay I*. 447 F.3d at 1353 n.3. Judge Johnson granted the Government's renewed motion for downward departure. [6a]. She explained her decision as to the proper extent of the § 5K1.1 departure, arriving at an advisory level 17. [23a]. This was the departure that the Government had requested in its renewed § 5K1.1 motion.

Judge Johnson then explained her findings and her decision as to the actual sentence, under 18 U.S.C. § 3553 and the *Booker* discretionary authority. [24a-28a]. She ultimately decided to reimpose the original sentence, concluding that "extraordinary facts of this defendant's assistance and the facts related to 3553(a) factors justify a substantial variance from the sentencing guideline range as determined with the departure." [28a]. So, she reimposed the original sentence: 6 months of home detention, $10,000 fine, $50,000 forfeiture, and 5 years' probation. [28a-29a]. Thus two separate District Judges had agreed that this was the sentence that 18 U.S.C. § 3553(a) has always demanded: the sentence that is "sufficient,

but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2).

The Government appealed the sentence once again. The Government did not claim that the District Court had made any procedural error. The Government did not claim that the District Court relied on any impermissible sentencing factor. The Government did not claim that the District Court misunderstood the governing legal standard. The Government, indeed, said in its brief to the Court of Appeals: "Judge Johnson carefully reviewed and assessed the § 3553(a) factors at sentencing." (Opening Brief of United States as Appellant, p. 17). Instead, the Government took issue with the bottom-line conclusion, and argued that the sentence needed to be more severe in order to further some of the purposes set forth in 18 U.S.C. § 3553.

In a brief *per curiam* opinion, the Court of Appeals vacated the sentence and remanded for yet another (third) sentencing. The Court declared, in language that was both cursory and conclusory, that the sentence was too short to meet some of the purposes in § 3553. Repeatedly describing the sentence with the one word "probation," and declining to mention the home detention as well as the fine and forfeiture, the Court insisted that a proper sentence for Mr. McVay must include incarceration.

As we will show, the Court of Appeals has given free rein to its own intuition, in a manner that is unsupported by fact and that is contrary to law.

REASONS FOR GRANTING THE PETITION

In *Booker* this Court held that the former mandatory-Guidelines system was inconsistent with the Sixth Amendment; and as a remedy, the Court held

that the Guidelines were only advisory. *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 594 (2007). At sentencing, a federal District Court is no longer bound to sentence only within the Guidelines range. Instead the District Court is to impose the sentence that it deems appropriate after considering both the Guidelines and the various factors listed in 18 U.S.C. § 3553(a). *Gall*, 128 S.Ct. at 596-97. That is, undisputedly, precisely what the District Court did in this case. There is no claim of procedural error by the District Court here, and no claim that the District Court misunderstood the governing law. There is only the claim, by the Government and by the Court of Appeals, that the sentence which two different District Judges agreed to be appropriate was *substantively* not severe enough.

In post-*Booker* decisions, this Court has developed the twin themes of sentencing in the advisory-Guidelines era: (1) deference to District Courts' experience and judgment, along with (2) a continuing recognition of the value of empirically-derived knowledge, which can lead to wiser and less divergent sentencing practices overall. A robust appreciation for District Court discretion – the discretion to choose a sentence that the District Court deems appropriate for the unique individual case – is what makes the system constitutional under *Booker*. But at the same time there is some limited room for appellate courts, using the wisdom that the Sentencing Commission accumulates through empirical study of nationwide sentencing practice, to correct sentences that deviate unreasonably from mainstream judicial practice. Those are the lessons of *Gall*, of *Kimbrough v. United States*, ___ U.S. ___, 128 S.Ct. 558 (2007), and of *Rita v. United States*, ___ U.S. ___, 127 S.Ct. 2456 (2007).

An implicit corollary from these themes, which in itself is dispositive of this case, naturally follows: A Court of Appeals cannot reverse a sentence based only on its own inexpert intuition that the sentence fails to meet some of the purposes set forth in § 3553. A Court of Appeals must have something more than its own gut feeling, in order to hold a sentence substantively unreasonable. We believe that this corollary is so self-evident from *Gall*, *Kimbrough*, and *Rita*, and its application so straightforward here, that a summary reversal is appropriate. But if there is any doubt about it, then the case presents an important and recurring issue of sentencing law that the Court ought to consider in full.

Here, the Court of Appeals literally had nothing more than its own subjective judgment – in other words, a mere intuition of its own – to support the pronouncement that the sentence was unreasonable. The core of the appellate court's reasoning was its belief that a sentence without a period of incarceration is simply too lenient for Mr. McVay's offenses – regardless of the particular facts about his involvement in the offenses, regardless of his stellar assistance to the prosecution, regardless of other facts about his life, and regardless of the fact that he was punished by (among other things) six months of home detention.

The Court of Appeals thus committed the same error that this Court corrected in *Gall*. While briefly paying lip service to the concept of sentencing court discretion, the Court of Appeals did not meaningfully apply that concept. Instead the Court of Appeals used its own judgment, effectively on a *de novo* basis. The Court of Appeals merely postulated its own judgment as to whether the sentence was sufficient

for various purposes under § 3553. It did not, in any real sense, treat the judgment of two District Judges as something that must even be taken seriously – much less as something to receive a due degree of deference. The very brief, conclusory, opinion by the Court of Appeals merely stated that Court's own view; it did not even address the District Court's view with any modicum of respect.

This is not merely our disappointed description of the decision by the Court of Appeals; instead we believe that it is plain on the face of the decision. We respectfully ask this Court just to read the opinion. It will take one or two minutes at most. We respectfully submit that, after that, practically every reader will agree that the words that this Court used in *Gall* are therefore every bit as applicable here.

> The Court of Appeals gave virtually no deference to the District Court's decision that the § 3553(a) factors justified a significant variance in this case. Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled de novo review of the facts presented and determined that, in its view, the degree of variance was not warranted.

Gall, 128 S.Ct. at 600.

The Court of Appeals also committed another error that this Court had already identified as error in *Gall*: the error of treating any sentence other than incarceration as a mere slap on the wrist. In *Gall*, this Court emphasized that even pure probation is a meaningfully punitive component of a sentence. *Gall*, 128 S.Ct. at 595-96. Here, McVay has been sentenced not only to five years of probation, a fine and

forfeiture; he has also been sentenced to, and has served, six months of home detention.[1] But the Court of Appeals – in both *McVay I* and *McVay II* – simply could not bring itself even to mention the home detention as part of the sentence. The Court of Appeals seems to have been determined to write as though only prison was meaningful punishment, even though this Court had already shown otherwise in *Gall*.[2]

If the Court of Appeals had actually applied the "abuse of discretion" standard of *Gall*, affirmance of the sentence would have been the only plausible outcome. The District Court, as the Government itself admitted in its brief to the Court of Appeals, "carefully reviewed and assessed the § 3553(a) factors at sentencing." (Opening Brief of United States as Appellant, p. 17). Even a brief review of the sentencing transcript, or even only of the quotations we have set forth above, shows that the Government's concession in its brief was correct: the District Court considered the § 3553 factors carefully.

The Court of Appeals reversed only because it thought its own view of those factors was better. The Court of Appeals wrote that the District Court

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[1] The Guidelines, it may be noted, treat six months of home detention as the equivalent of an equal period of incarceration at level 10. *See* U.S.S.G. §§ 5B1.1, 5C1.1. This makes it all the more inappropriate for the Court of Appeals to have treated the home detention as no punishment at all.

[2] It is also important to note that the Congress chose not to require incarceration for Mr. McVay's offenses. Congress has made that choice for some offenses, but has chosen not to put these offenses in that category. *See* 18 U.S.C. § 3561 (designating those categories of offenses for which probation alone is not permissible). Thus, again, the Court of Appeals was relying on nothing but its own intuition, rather than on any identifiable law or fact about sentencing.

"wholly failed to consider, among other things, the seriousness and full implications of McVay's criminal conduct." That assertion is plainly incorrect if meant literally; if it means anything, it means instead only that the Court of Appeals disagreed with the way that the District Court considered those factors. That is the error identified in *Gall*, committed once again here.

The District Court's view of the § 3553 factors in this case was not only careful; it was eminently sensible. Indeed, the District Court's decision in this case offers a textbook example of a situation in which it is most reasonable for a District Court to deviate somewhat from the Guidelines, in light of the particular facts of the case. Such deviation was most reasonable in this case because the Guidelines give less useful advice here than they do in most cases.

The first reason why the Guidelines' advice is least compelling in this case is that the Guidelines actually do not give any quantified advice at all. In cases where the Government moves for a downward departure because the defendant has substantially assisted the Government, Guidelines § 5K1.1 gives literally no quantified advice about how many levels to depart. There is, furthermore, no way for the Court of Appeals to know what degree of departure most sentencing judges would apply, in a case presenting a similar offense and a similar stellar degree of assistance. We know that the District Court in this case departed down to a level 17, as the Government itself had requested. But we – and more importantly the Court of Appeals – have no way of knowing whether other sentencing courts would tend to depart even more than that, or less, or to the same degree. The Court of Appeals therefore had nothing to judge the

departure or the ultimate sentence against, other than its own intuition. As this Court emphasized in *Gall*, the institutional role and experience of District Courts makes them far better at making this sort of judgment than appellate judges are. *Gall*, 128 S.Ct. at 597-98 & n.7.

The second reason why the Guidelines' advice is least compelling in this case is demonstrated by this Court's opinion in *Kimbrough*. That is, even the pre-departure offense level of 29, in this case, was the sort of non-empirically-derived Guidelines calculation that, under *Kimbrough*, is most ripe for a reasonable variance by a thoughtful sentencing court. This Court recognized in *Gall* and *Kimbrough* that the Sentencing Commission has usually used an empirically-based process that attempts to mirror the mainstream of sentencing judges' decisions. That, in fact, is precisely why the Guidelines advice is usually useful. *Gall*, 128 S.Ct. at 594; *Kimbrough*, 128 S.Ct. at 567, 574 But, the Court recognized in *Kimbrough*, in some areas the Commission has strayed from that empirical focus, preferring instead to rely on its own views rather than following the mainstream of judicial thinking. The Court recognized in *Kimbrough* that, in those areas, sentencing judges have a heightened degree of leeway to vary from the Guidelines and to make their own judgments about what sentence will comport with § 3553. *Kimbrough*, 128 S.Ct. at 575; *Gall*, 128 S.Ct. at 594, n. 2

Just like the "crack" Guidelines in *Kimbrough*, the pre-departure offense level in this case was the product of a non-empirically-derived process. It was not based on any attempt to mirror the mainstream of wise judicial practice. The Sentencing Commission, even at the outset of the Guidelines era, substituted

its own judgment of what sentences ought to be given in fraud cases; it rejected the judgment that was reflected in actual historical sentencing practice. Justice Breyer explained this in The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 18-20 (1988) (describing "the Commission's decision to increase the severity of punishment for white-collar crime" as one of the areas in which "the Commission deviated from average past practice, when, for one reason or another, it wished to modify the typical results which occurred in pre-Guideline sentencing."). And this deviation from the empirical approach has only become more pronounced over time, as the Sentencing Commission has ratcheted the fraud/loss Guidelines steadily upward, based not on empirical study of sentencing practice but on disputable policy judgments. As a former Sentencing Commissioner and a former Commission deputy chief counsel put it,

> The Commission's 1991 organizational guidelines were not the first instance of deviation from both sentencing principles and past practice analysis. In fact, that trend began soon after the initial guidelines, and set a pattern of decisionmaking that has continued over the ensuing decade. Earlier examples date back at least to the 1989 amendments to the robbery and fraud guidelines, both of which involved gratuitous increases in punishment levels that had no basis in either principle or practice, and instead were essentially political decisions reflecting responses to interest group pressures. In the case of the fraud guideline, the pressure came from the Department of Justice, which argued to the Commission that recent media attention to widely-publicized fraud cases, and recent congressional legislation

> that did not in terms call for any increase in average punishment levels, nevertheless had sent a "signal" to the Commission that it must raise those levels. This was the beginning of a purely political mode of operation within the Commission.

Parker and Block, The Limits of Federal Criminal Sentencing Policy: or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (footnotes omitted); *see also id.* at 1036 ("the fraud guideline was swept up in the Commission's more general retreat from both principle and past practice, beginning with its 1989 amendment, which is one of the first examples of a gratuitous increase in punishment levels based purely upon interest-group pressure.").

Therefore, there is nothing at all suspect about the District Court's decision to vary downward a few levels from the post-departure advisory Guidelines range.[3] It was entirely reasonable for the District Court to make its own judgment about the § 3553(a) factors based on (among other things) its own assessment of Mr. McVay's particular offense conduct, rather than hewing blindly to the one-size-fits-all advice of a Guidelines calculation. After all, the pre-departure advisory Guidelines level of 29 was overwhelmingly the product of an enormous 26-level enhancement based on the amount of "loss," the very sort of non-empirically-derived decision that *Kimbrough* discussed. *McVay I*, 447 F.3d at 1350. It was, to say

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[3] The sentence that the two District Judges agreed upon was a level 10 sentence. Thus the variance, viewed in terms of Guidelines levels, was only 7 levels as compared to a pre-departure offense level of 29.

the least, reasonable for the District Court to temper that advice with a fact-specific focus on how McVay's offense conduct was very different from the offense conduct of others in the scheme. As noted in the statement of facts above, McVay's conduct was short and limited – a fact that is practically lost in the Guidelines advice. In exercising judgment to vary from that one-size-fits-all advice, the District Court did what sentencing courts are supposed to do. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 128 S.Ct. at 598.

Even in cases where the Guidelines give more concrete and more useful advice than in this case, a proper application of *Gall* will permit variances at least as large as this one. As noted above, the post-departure Guidelines level – which the Court of Appeals did not question – was 17. At the lowest criminal history level, which is applicable to McVay, this yields an advisory range of 24 to 30 months. [24a]. The variance down to six months of home detention – a sentence at level 10 – was not extreme by any reasonable reckoning.

This was a markedly smaller variance than this Court upheld in *Gall*. Gall's advisory sentence was 30 to 37 months (higher than McVay's), but this Court nonetheless upheld a sentence consisting only of 36 months' probation (whereas McVay received a substantially longer period of probation as well as six months of home detention). *Gall*, 128 S.Ct. at 593. This was also a smaller variance than was upheld, just to take another recent example, in *United States*

v. Thurston, 544 F.3d 22 (1st Cir. 2008) (affirming sentence of three months incarceration, over Government's appeal, where Guidelines offense level was 26 and where the advisory sentence was the statutory maximum of 60 months). Similarly, the variance in this case was analogous to the variance upheld in *United States v. Howe*, 543 F.3d 128 (3rd Cir. 2008) (affirming sentence of three months' home confinement and two years' probation with no fine or forfeiture, over Government's appeal, where advisory Guidelines range was 18 to 24 months). As another example, there is *United States v. Gardellini*, ___ F.3d ____, 2008 U.S. App. LEXIS 23911 (D.C. Cir. 2008) (affirming sentence of no incarceration and no home detention, over Government's appeal, where the advisory range was 10 to 16 months). *Gardellini*, like *Thurston* and *Howe*, represents the correctly deferential approach to appellate review; it is an approach that is wholly different from the approach taken by the Court of Appeals in this case.

The decision below represents a stark conflict with *Thurston*, *Howe*, and *Gardellini*. Even though one can always find some uniqueness about any particular set of facts in an attempt to distinguish one appellate sentencing case from another, it remains true that these cases are irreconcilable in their fundamental approach to appellate review.

The decision below is, similarly, in conflict with *Gall* itself. And again, *Gall* was a case where there was actual concrete, and empirically-derived, Guidelines advice that gave a sense of how the sentence compared to the mainstream of judicial thought. Here, as we have said, the Court of Appeals did not even have the benefit of that sort of good Guidelines advice.

In short, the decision of the Court of Appeals in this case bears no resemblance to the post-*Booker* sentencing scheme as this Court has described it. The Court of Appeals in this case was not even purporting to guide District Courts in future cases; thus the decision of the Court of Appeals cannot even be defended as having been an effort to ensure some heightened degree of sentencing uniformity. On the contrary, by making its decision "non-published," the Court of Appeals sought merely to exercise power over the sentence for this particular individual, based not on any identifiable principle of law or empirically-derived fact, but instead based only on the gut feeling that he ought to be incarcerated. The Court of Appeals has mistaken the proper boundaries of its institutional role in sentencing. The role of the Court of Appeals is not to create an *ad hoc* mandatory minimum sentence, where the Congress has not done so and where the Sentencing Commission has not even given quantified or empirically-derived advice. The role of the Court of Appeals is not to follow its own intuition, at the expense of the judgment and experience of the sentencing court. The decision below is so blatantly erroneous that this Court should summarily reverse; but if there is any doubt, the Court should grant full review to clarify the nature of "substantive reasonableness" review after *Gall*.

CONCLUSION

For the foregoing reasons, this Court should either summarily reverse, or grant review and set the case for briefing and argument.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed September 19, 2008]

No. 07-11264
D. C. Docket No. 03-00195 CR-2-IPJ-JGD

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MALCOM E. MCVAY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before DUBINA, HULL and FAY, Circuit Judges.

PER CURIAM:

This is the second time we have considered an appeal in this case. In our first decision, *United States v. McVay*, 447 F.3d 1348 (11th Cir. 2006), we vacated McVay's 60-month probationary sentence and remanded the case for resentencing. ("*McVay I*"). On remand, the district court again imposed a 60-month probationary sentence, and the government appealed.

It is important to recognize that the government is not challenging in this appeal the district court's advisory guideline calculation (as was done in *McVay I*), or its imposition of a U.S.S.G. § 5K1.1 departure. In fact, the government concedes that the district court fully complied with the law in this circuit in both regards. The government's challenge in this case is limited to the reasonableness of the sentence the district court imposed. In light of the factors enumerated in 18 U.S.C. § 3553(a), including the seriousness of the offense, the need to promote respect for the law, and the need for just punishment, a non-custodial sentence for a key participant in a corporate fraud that exceeded a loss of a billion dollars and left victims too numerous to be counted is, argued by the government, unreasonable. We agree.

After considering what the Supreme Court said in *Gall v. United States*, 128 S. Ct. 586 (2007), and after reviewing what the district court did on resentencing in this case, we conclude that the district court abused its discretion when it wholly failed to consider, among other things, the seriousness and full implications of McVay's criminal conduct.

A sentence of probation for a high-ranking officer in a corporation where over a billion dollars of fraud was perpetrated on an unsuspecting work force and investing public is not reasonable, given the criteria found in § 3553(a) for determining an appropriate sentence. Probation does not account for the seriousness of McVay's conduct. It does not punish him sufficiently. It does not deter the defendant's future misconduct. It does not deter other similarly situated individuals from engaging in criminal conduct. It does nothing to encourage respect for the

court system in this country. Post-*Gall*, a district court need not justify an extraordinary departure with extraordinary reasons, but it must still provide a compelling justification for the sentence it selects. In our view, that was not done in this case. We once again vacate McVay's sentence and remand this case for resentencing.

VACATED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

2:03-CR-195-IPJ-HGD-ALL

UNITED STATES OF AMERICA
Plaintiff,

v.

MALCOLM E. MCVAY,
Defendant.

February 22, 2007
11:30 a.m.
Birmingham, Alabama

TRANSCRIPT OF RESENTENCING HEARING BEFORE THE HONORABLE INGE P. JOHNSON UNITED STATES DISTRICT JUDGE

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Court Reporter:

LEAH S. TURNER, CSR, RMR, CRR

[2] This cause came to be heard and was heard on the 22nd day of February, 2007, before the Honorable Inge P. Johnson, United States District Judge, holding court for United States District Court, Northern District of Alabama, Southern Division, in Birmingham, Alabama.

Proceedings continued as follows:

PROCEEDINGS
(COURT CALLED TO ORDER.)

THE COURT: This is CR-03-195, the United States v. Malcolm E. McVay. Are you, Mr. McVay?

THE DEFENDANT: Yes, ma'am.

THE COURT: Good morning.

THE DEFENDANT: Good morning.

THE COURT: Let the record show Mr. McVay is present with his attorney, Don Foster, and the Assistant U.S. Attorney, James Ingram, is here representing the Government, and this is the time set for sentencing. Actually, we are here today to resentence this defendant in accordance with the opinion of the Eleventh Circuit filed on May 5, 2006, and issued as a mandate on June 5, 2006, which vacated the sentence and remanded the case to this Court to resentence.

Specifically, the Circuit directed that this Court consider the factors found in U.S.S.G. Section 5K1.1A in deciding the nature and extent of a [3] substantial assistance departure and then discuss the reasons for the extent of the departure in light of the Advisory Guideline Range and the sentence factors found at 18 U.S.C. Section 3553(a).

This Court takes note that the Booker decision applied to cases on direct appeal in January of 2005. Therefore, in resentencing this defendant today, the Guidelines will be considered as advisory only pursuant to Booker. And to reconfirm this Court's previous findings, the Guideline Level was calculated to be 29, which when combined with a Criminal History Category of 1 resulted in a sentencing range of 87 to 108 months, a supervised release term of 2 years to 3 years, and a fine range of 15,000 to $1 million dollars.

The Court has, again, considered the Government's motion for substantial assistance, and that was amended yesterday afternoon—did you get a copy?

MR. FOSTER: Just this morning, Your Honor.

THE COURT:—and the arguments of counsel. I have read the plea transcript. I have read the sentencing transcript. And I don't think anybody disputes that the motion is due to be granted.

So before I proceed to actually sentence in [4] this case, I want to ask if the defendant and/or his counsel wish to be heard or to make comments in addition to those filed in the resentencing memorandum, which I have also read. And, of course, I will ask the same thing if the Government wants to be heard.

So you may proceed if you wish to be heard.

MR. FOSTER: Thank you, ma'am. Your Honor, we strongly object to the recommendation of the Government for the 28 months incarceration. It's particularly out of line in view of the fact that relative to the other participants in this conspiracy, that Mr. McVay was probably the least of all—he is a lightweight in the scheme of things, and I think that's probably reflected easily in the forfeitures.

He didn't get any of the big money. In fact, he got very little money; whereas, most of the other more culpable defendants got big money and the forfeiture reflects the fact that they got a lot more money out of this than did my client.

As a matter of fact, Your Honor, if I may, I would like to offer Defendant's Exhibit 1, which is a table that I have prepared with the defendants, the years they were in the company, the positions they held, their fine. I don't have all the fines.

[5] THE COURT: I do. I have studied that, too. But that's all right. I read through all the other defendants before today to make sure I knew what they got and who they were and where they worked and what they did.

MR. FOSTER: Well, as usual, you are five steps ahead of me.

THE COURT: But that's all right. Have you shown it to Mr. Ingram?

MR. FOSTER: I have.

THE COURT: Any objections?

MR. INGRAM: None from the Government.

THE COURT: That's admitted, then.

MR. FOSTER: May I give this to you?

THE COURT: Yes. Have Tammi mark it first and then give it to me.

MR. FOSTER: Your Honor, as I was saying, the request that the Government made in its 5K1.1 of 28 months is way out of line, particularly in view of the fact that we think that the original sentence should be reimposed with the support that we know this

Court would put into the judgment that the Eleventh Circuit said was lacking before.

But in respect to that, just that 28-month request, I would have to bring to your attention that [6] in the Livesay case, which is now pending in the Eleventh Circuit, the Government in its brief—and I have a copy of it; it was not written by Mr. Ingram—it said that Mr. Livesay was more culpable than several defendants, including Mr. McVay, and yet they recommended 20 months for Mr. Livesay even though they claimed that he is more culpable than Mr. McVay.

Mr. McVay has paid a heavy price for what he did. He is very sorry for what he did. But when you compare his offense conduct, Your Honor, of being in this conspiracy for 1 month—or 1 quarter, rather, 4 months at the most, compared to the other defendants in this case, as Your Honor has seen in all this that has been heard, he was probably the smallest fish in the sea; and yet he has also suffered the most because he did not get anything out of it; and yet he has had to forfeit whatever he did get, which was $50,000.

And that's based just on the increase in his salary, and that's a Government-agreed figure. That's not something that the Court determined. That's the Government's own agreement.

He has got very few assets left; whereas, if you follow the money trail you can see the people who got the money. Everybody got more money than Tad out of this deal. I'm not trying to justify Tad's [7] participation. I'm trying to put it in perspective. And I think that when you put this money in perspective, you can see that he was truly a lightweight in this conspiracy.

He was not an insider, he was not part of the family on that side, on that side of the balancing sheet.

On the other side, as far as the substantial assistance, you can't get any better than what he did for the Government, and the Government has virtually admitted that. I can go back in the brief and read you—which you've already read it.

THE COURT: I read it.

MR. FOSTER: You've seen the accolades that he was given by the Government. So the man tried more than he could do. He just wanted to be so forthright and so helpful, that he volunteered anything he could do, any time he could do it; he was accessible; he was honest; he was forthcoming; and he was very helpful; and he particularly strikes me as being helpful whenever—the Government not only agrees that his service was invaluable to them in their prosecution of others in getting other defendants to plead, but with respect to the fact that it also helped HealthSouth move faster to determine their financial posture. He helped them understand the financial situation that [8] existed there. So indirectly it helped the shareholders.

Mr. McVay's testimony, as you see in his 5K.1 brief filed this morning—or yesterday, his testimony was over 2 days, and he had countless meetings and spent countless hours helping the lawyers get prepared for this trial, and he would have done anything within reason that he was asked to do. So you can't get any more cooperation, I don't think, in this case than what Tad has done.

And the other part of the equation is his personal situation. It has been 4 years since this was exposed and since he has been a public figure. It has been

over 2 years since he was first sentenced. And I would like for you to hear from him, Judge.

THE COURT: I will. If he wants to say something, he can.

MR. FOSTER: Yes, ma'am. He has suffered immensely from what he did. And it has been 4 years now that he has had to endure it. He has an invalid father who is in his mid-80s down in Mobile. He is a single parent. He is putting his daughter through college. And his daughter relies on him for support. You may have read her letter.

THE COURT: I have read everything that was [9] sent to Judge Clemon and everything that has been sent to me.

MR. FOSTER: And you read Emery Harris' letter, too?

THE COURT: I have read Emery Harris' letter. I have read Mr. McVay's letter. I have read Mr. Camp's letter from Meadowcraft. I have read everything. I promise you, I have read everything.

MR. FOSTER: I believe that. So you know what people think of Tad and you know what his daughter thinks of him and how important he is in her life. He is now, for the last couple of years, gainfully employed. And I have his employer here to say a few words if you would like to hear from him—

THE COURT: That would be fine.

MR. FOSTER:—to show you what progress he has made. He is an asset now to the community, and we hope that you will let him stay in the community and not take him out, because I think he is ready to make a positive contribution to the community now and be-

come a valid taxpayer again—a viable one, I should say.

So I think that if Your Honor puts this in context, we hope that you will come to the conclusion that the original sentence was fair and reasonable, [10] and that with the proper written support in this judgment of sentencing, that it would be upheld by the Eleventh Circuit if the Government chose to appeal again.

I think the circumstances are extraordinary and I think they support a departure to the same extent that Judge Clemon did. So we would hope Your Honor would do that.

If it pleases the Court, do you have any questions you would like for me to answer?

THE COURT: No, sir.

MR. FOSTER: Would you like to hear now from a couple of people?

THE COURT: That would be fine. They don't have to come up. They can just stay where they are and I will swear them. Whoever wants to testify can. Unless you would like to have them up here. Would you like, Mr. Ingram, to have them up here?

MR. INGRAM: Either way is fine, Your Honor. Whatever the Court prefers.

THE COURT: Are they just going to make some remarks?

MR. FOSTER: Yes, ma'am, just a few, just brief remarks. And I would like to close by saying: [11] Obviously there's a lot in the brief, the sentencing memorandum, that we sent you and we would appreciate the Court's attention to it. It says far more than I could say up here at the podium. So please forgive

me if I have left anything out to Your Honor this morning. But I do think that the sentencing memo says a lot about what can be done to substantiate a sentence that would be in line with the original sentence.

THE COURT: All right.

MR. FOSTER: We would like to ask the Court to please hear Mr. Jerry Camp.

THE COURT: And who else? Just Mr. Camp?

MR. FOSTER: And Mr. Tad McVay.

THE COURT: All right. MR. FOSTER: Mr. Camp? Judge, if you don't mind, I would rather him come up there.

THE COURT: All right.

JERRY CAMP,

called as a witness on behalf of the defendant, having been sworn to speak the truth, testified on his oath as follows:

[12]DIRECT EXAMINATION BY MR. FOSTER:

Q. Mr. Camp, would you identify yourself for the Court?

A. Yes. My name is Jerry Camp. I am the president of Meadowcraft.

Q. What is Meadowcraft?

A. Outdoor furniture company. We are the largest left in the States, largest in the world.

THE COURT: I know all about them. I have Meadowcraft furniture.

MR. FOSTER: In that case, we'll move on.

BY MR. FOSTER:

Q. Could you tell the Court how you know Tad McVay?

A. Yes. He works for me.

Q. How did he come to work for you?

A. If I can go back a little bit, 4 years ago we went through bankruptcy, that you probably read about. And we've been working for 4 years vigorously to build our company back and to build a world-class organization, and we had two major objectives we had to accomplish. One of those, we had to build a world class R&D center. Our business has become more fashion. It's changing very quickly. So we went on a [13] quest to find somebody that could build and run that department for us.

We looked almost a year, as you saw in the letter, without any success, and then we met Tad. We knew there was some risk. Tad was as forthcoming as anybody could be about his situation, but we felt like he had the skills to do the job and we felt like he deserved a chance, and so we hired him.

We are 18 months later, and Tad has done a phenomenal job in building us towards the world-class R&D center. We have world-class designers, we have world-class prototype shops, and the speed-to-market from concept-to-market has increased dramatically at Tad's direction. So Tad has become an essential part of our company in our two main objectives.

We don't have a backup to Tad. We don't have backup management; can't hardly have that anymore. And so we desperately need Tad, which is why we need him at work. And we have a fairly large company, a lot of people depending on us, and we have made Tad a critical part of the company, and he has risen to become one of our leaders and we need him. That's how I know him. Anything else?

MR. FOSTER: That says it all. Your Honor, would you like—

[14] THE COURT: I don't have any more questions. Do you have any questions?

MR. INGRAM: No questions, Your Honor. I had an opportunity to speak to Mr. Camp a few months ago about Mr. McVay.

THE COURT: Thank you.

MR. FOSTER: Your Honor, I call Tad McVay.

THE COURT: All right. Just approach the podium.

THE DEFENDANT: Your Honor, I'm not as eloquent as Mr. Camp. I'm not president of the company. Maybe that's part of it. I'm going to need to read. It's due to my nerves.

THE COURT: That's fine.

THE DEFENDANT: First and foremost, I want to reiterate the apology I offered upon pleading guilty almost 4 years ago. I also want to repeat the apology from my initial sentencing over 2 1/2 years ago. Today I remain profoundly sorry for my role in the HealthSouth fraud. I was informed of the fraud in mid-September of '02, shortly after becoming CFO. By January I was out as CFO. And within 90 more days, the fraud had been exposed.

My family's life has been irreparably impacted by my poor decisions during those few months. [15] Only I am to blame. In the 4 years that ensued, I have not slept peacefully. I am consumed by the guilt that my poor judgment brought upon my precious child and others. If there was any way to go back in time, I would be first in line.

I have already served the majority of my previous sentence. I continue to report regularly with my probation officer, who is here today—I thank him for coming—though that reporting, I don't think, is any longer required since the vacating of my sentence.

THE COURT: Let me ask you this: Have you been reporting since?

THE DEFENDANT: Without fail, Your Honor.

THE COURT: Since the vacation?

THE DEFENDANT: Yes, ma'am, every month. And if I'm ever going out of the district, I always call and ask permission.

THE COURT: That was one of my questions.

THE DEFENDANT: Yes, ma'am. The spectra of HealthSouth follows me constantly. I have endured relentless public humiliation that will follow me always. I have struggled to cope with a purgatory-like existence for 4 long years, a man without a foreseeable future. But I have also been blessed. [16] My faith has taken root. My daughter is healthy and working hard in school. And after searching for 2 years, 2 long years, to find a suitable job, I have been employed, as Jerry Camp just said, since June of 2005 with an absolutely world-class organization.

In everyday life, some people avoid me like the plague. They do not wish to be associated with me. But many more have been kind and supportive. And for those things, I'm very thankful. Thank you, Your Honor.

THE COURT: Thank you.

Do you have any questions you want to ask Mr. McVay, Mr. Ingram?

MR. INGRAM: No, Your Honor.

MR. FOSTER: Your Honor, one last thing. David Anderson, his probation officer, is here today. I've talked to David and he tells me Mr. McVay has been a superlative person in his position on probation, and he would be glad to tell the Court that if you would like him to.

THE COURT: Well, I'm just curious whether or not the original fine was paid.

MR. FOSTER: It was.

THE COURT: The original forfeiture?

MR. FOSTER: It was.

[17] THE COURT: And the original home detention was served?

MR. FOSTER: Everything has been paid, Your Honor.

THE COURT: And you're still on the probation that Judge Clemon put you on for 60 months?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The 60 months have not run yet?

MR. FOSTER: The 60 months have not run yet.

THE COURT: All right. I'm sure probation would have let me know if he was not a model on probation. They usually let me know that.

MR. FOSTER: My only point would be that he has been extraordinary on probation, and Mr. Armstrong would say that.

THE COURT: That's all right.

MR. FOSTER: Thank you.

THE COURT: Mr. Ingram?

MR. INGRAM: Thank you, Your Honor. Just a few points I would like to touch on, Your Honor. Of course, with the Government's addendum on the 5K motion, the Government certainly wanted to bring to the Court's attention Mr. McVay's additional substantial cooperation that he has provided to us since the original sentencing and, of course, as was [18] set out, his involvement in preparation for the Scrushy trial and his assistance to the FBI and SEC in reviewing numerous documents over numerous hours, and he certainly is deserving of consideration for all that he has done in that regard.

At the same time, all of that substantial assistance cannot serve as a get-out-of-jail-free card, Your Honor. The seriousness of this offense is such that it simply warrants some more punishment than simply a slap on the wrist of 5 years of probation. The sentencing factors under 3553(a), as the Court is well aware, touch on various things, but one of the most important is perhaps the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment.

Mr. Foster referred to Mr. McVay as a lightweight, and relatively speaking, of course, he was there the shortest period of time on deck as a CFO at HealthSouth. But nevertheless, given his background and his awareness that the numbers at HealthSouth were so false and so misleading, to then go ahead and sign off on a 10-Q as the CFO of the company, knowing as he did that those numbers would be sent to the SEC, made available to the investing [19] public, and relied upon by thousands of investors, both institutional and individual, on those numbers.

Regardless of the fact that Mr. McVay did not help put on new fraud on those numbers, he signed off on the existing fraud that was already there with knowledge that they were fraudulent, and passed those on to the public and Government regulators. And so he is distinguished by his length of tenure as a CFO, but not in the seriousness of what he did as CFO.

By signing off on that 10-Q, whether it's one time, four times, regardless of the number, those numbers are being passed on to the Government and to investors around the world who look to those numbers in making their investing decisions, and the Court, I know, is well familiar with this case and the impact it had on the company, the community, its employees, and thousands of investors.

But bearing all that in mind, the Government believes that a period of imprisonment is an appropriate sentence in this case. Now, Mr. Foster's chart that he submitted as Defendant's Exhibit 1 compares all the various defendants in the HealthSouth case, and in looking at—I just want to bring to the Court's attention: One of the other factors, of course, under 3553(a) is to avoid any sentencing [20] disparity. And the Government—

[21] THE COURT: Particularly with myself. I don't need any disparity between myself in my other sentencings.

MR. INGRAM: Yes, Your Honor. The Government's recommendations made to the Court for each of the other three CFOs who are in the same boat, so to speak, Mr. Owens, Mr. Smith, and Mr. Martin, were all higher recommendations than the Government's recommendation here for Mr. McVay.

So the Government fully recognizes that Mr. McVay's tenure there was shorter. But the seriousness of the offense is no less so than those of the other CFOs. For that reason, the Government believes that a sentence of 28 months is an appropriate punishment to impose in this case, weighing all the factors that the Court must weigh in deciding what an appropriate downward departure is from the original guideline number.

I believe that is all I wish to make note of. I think Mr. Foster also touched on—stating that, I think, with regard to the Livesay appeal that he was more culpable. Again, Mr. McVay in the role as CFO held a higher position at that time and by signing off on the 10-Q post-passage of the Sarbanes-Oxley, that [21] Congress recognized the need for closer scrutiny or accountability by public corporations to present accurate, correct numbers to the public, even with that already on the books, Mr. McVay signed his 10-Q in November of 2002 and passed on those false numbers.

So, again, in closing, Your Honor, that is an offense that the seriousness is such that warrants an imposition of 28 months. Thank you, Your Honor.

THE COURT: I want to just point something out that I know has crossed everybody's mind who has had anything to do with any of these defendants in this HealthSouth conspiracy, and that is that the one person that the Government really still believes is responsible was acquitted. And it's ironic that everybody below him in the corporate hierarchy ended up with prison sentences or jail sentences or probation sentences or house arrest sentences or whatever, but various sentences, and I don't believe Mr. Ingram disagrees with me that the Government believed, ob-

viously, that that was the ultimate culpable person in this conspiracy; otherwise, they wouldn't have prosecuted him. And I don't think the Government maintains that any defendant's assistance to the Government, including this defendant's assistance, is any less valuable just because that [22] case did not end up like the Government had hoped.

MR. INGRAM: No, Your Honor.

THE COURT: And that's just an irony of the whole situation, that that person was acquitted and all his underlings pled guilty. One was tried, and that was Mr. Crumpler, I believe. And I believe that case is still on appeal, so I'm not even going to discuss that.

I have looked at your sentencing memorandum and I have read the letters, and I've gotten a letter from Emery Harris just the other day which I plan to refer to, just because he was a coconspirator and he was the one who reported to Mr. McVay for a short period of time and he pled guilty and otherwise assisted the Government like Mr. McVay did and was found truthful by the Government when they filed the motion for downward departure in his case. But with all that being said, I'm going to proceed with sentencing.

The factors that this Court has taken into consideration in considering the motion, that is, the motion for downward departure as amended, which I have already stated is due to be granted, which everybody agrees is due to be granted, and in reaching its conclusion in regard to the appropriate departure are [23] found in the United States Sentencing Guidelines, Section 5K1.1, specifically the Court has relied on the follows factors:

One, the Court's evaluation of the significance and usefulness of the defendant's assistance, taking into

consideration the Government's evaluation of the assistance rendered. And I want to say that with respect to that factor that I have relied on the descriptions of the defendant's assistance found in the Government's motion for downward departure just not only as originally filed but as amended on February 21, 2007, and from statements—I have also read the original plea transcript.

Pertaining to this first 5K1.1 factor, the Government stated that—and I quote—"The defendant has provided invaluable assistance in helping the United States, HealthSouth, and the forensic auditor discover in an expeditious manner the various ways in which the HealthSouth fraud was conducted. Specifically, the defendant has helped explain specific transactions and has provided information implicating several other culpable individuals." That was the end of the quote.

I also find based on the Government's motion [24] and reading what I have read that the defendant helped explain HealthSouth's relationship with Wall Street analysts and backing institutions and assisted the investigation by showing the Government which parts of the publicly filed financial statements contained the false information. He also gave information about specific conversations with people in HealthSouth that directed the fraud, and the Government stated in its motion that the defendant's immediate cooperation has allowed the HealthSouth case to be prosecuted at a pace which constitutes swift and efficient enforcement of the criminal laws.

The second factor that is mentioned in 5K1.1 is the truthfulness, completeness, and reliability of any information or testimony provided by the defendant. With respect to that factor, I find that the Govern-

ment stated that the defendant truthfully and completely confessed his participation and that information he provided has also corroborated information by other individuals and that it has been truthful and accurate. And I quote, "His testimony facilitated both the securing of guilty pleas and the prosecution of other individuals. Based on its reliability, the Government repeatedly relied on it in subsequent prosecutions."

[25] The Government stated in its amended motion that the defendant met with prosecutors on at least—and that is since the last sentencing—that the defendant met with the prosecutors on at least 10 occasions during the period December '04 through February 2005, each of these occasions lasting approximately 3 to 4 hours. The motion as amended goes on to state that Mr. McVay spent substantial time reviewing financial documents on each four, five occasions, and additionally the motion states that in March of 2005 the defendant testified for 2 days on behalf of the Government at the criminal trial of the former CEO of HealthSouth and that information provided by the defendant to the Government as well as his testimony at trial is believed by the Government to be truthful and accurate.

The third factor is the nature and extent of the defendant's assistance. And from reading the motion, the motion as amended, it was not just the truthfulness, completeness, and reliability of the defendant's assistance that helped to make it valuable to the Government. In addition, he lent a level of expertise that helped to educate the investigators, thereby improving the quality of this and other investigations.

[26] Further, the defendant made himself available to a great extent. And that's stated clearly in both mo-

tions. He was available on a continuous and regular basis and whenever needed with representatives of the United States, HealthSouth, and the forensic auditor reconstructing HealthSouth's books. He spent many hours reviewing financial statements and numerous other documents.

Furthermore, as stated in the most recent amended motion by the Government, his assistance continued long past his original sentencing, and he continues to provide time and expertise to the Government, including the FBI and the Securities and Exchange Commission, each of which according to the Government's motion has substantial need for his assistance.

There is a factor in 5K1.1 that has no applicability in this case, that is, any injury suffered or any danger or risk of injury to the defendant or his family resulting from his assistance.

The next factor pursuant to 5K1.1 for the Court to consider is the timeliness of the defendant's assistance. According to the Government, the details of the fraudulent schemes were exposed to the public shortly after the discovery of the fraud due in part [27] to the defendant's cooperation. And amazingly, according to the Government, it was this defendant's assistance that helped reassure the Nation's financial market in the wake of the scandal and has contributed to HealthSouth's ability to begin its recovery—that was pointed out by Mr. Foster—and thus helping the shareholders, who are the victims of this offense.

Based on these 5K1.1 factors, I find that a departure should be granted, and I depart to Level 17, which when combined with a Criminal History Cate-

gory of 1 results in a sentencing range of 24 months to 30 months and a fine range of 5,000 to $1 million under the Advisory Guidelines.

However, as you know, since Booker the decision of the appropriate sentence does not rest here. Although not included in its original motion for downward departure, I understand that it was the Government's recommendation at the original sentencing that the defendant receive a 65-month sentence with a 5K1.1 departure, and I got that from reading the sentencing transcript.

Based on the Government's own words used to describe the defendant's cooperation and which I quoted above at some length, I find that such recommendation was not quite reasonable. But I do [28] know, in all fairness to the Government, that they did not make the recommendations of any appropriate sentence in their opinion in the cases I have previously handled in this HealthSouth fraud, which were Emery Harris, Cathy Edwards, Rebecca Morgan, Angela Ayers, and Virginia Valentine; there were no recommendations made by the Government.

In its amended motion, the Government has now recommended a sentence of 28 months, albeit based on the defendant's additional cooperation.

Before pronouncing this sentence in this case, which I find to be appropriate in light of the defendant's cooperation, I wish to and I will identify the sentencing factors found in 18 U.S.C. Section 3553(a) on which I have relied in choosing the appropriate sentence in this case.

Specifically, I have relied on the following factors: The nature and circumstances of the offense, the history and the characteristics of the defendant, the

need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and the need to avoid unwarranted sentence disparities among the defendants with similar records who have been found guilty of similar conduct.

[29] Specifically in regard to these 3553(a) factors, I find that this defendant had been in his position as CFO less than 1 month when he was presented with a document to sign which he had learned contained false information.

More specifically I find, however, that it was the attachments to the document, not the document that he had helped prepare, which contained the false information. He had no knowledge of the amount of misstated funds but was advised not only by Emery Harris to sign the document, but by Mr. Scrushy as well.

Actually, if I understand completely correctly what was said in the plea transcript, he talked to Mr. Harris about it at the time he was about to sign the document when Mr. Harris told him that the attachments contained some false figures, and he talked to Mr. Scrushy afterwards about it.

This one act, the signing of the quarterly report, compromised the whole of his involvement in this lengthy and broad conspiracy. He was not a member of the family that we have heard so much about and has never founded and prolonged the fraud, nor did he attend the family meetings. Not many months after signing the one and only document, the defendant was [30] removed from his position as CFO and at no time did he direct anyone in furtherance of this conspiracy.

I have also examined the sentences imposed on co-defendants and on defendants in related cases. The sentence I have selected compares to those of similarly-situated defendants. The defendant's comparison of all these various sentences is in the records. I don't think I actually need to go through every one of them. But there are several sentences of probation.

The sentence in particular that I want to talk about here is that—the sentence I have selected is less that the 5-month custodial sentence that Emery Harris received. He obviously had more involvement with the fraud than the defendant did. There is no dispute from anybody that the defendant did not know about it until he was told as CFO to sign the quarterly report, and he did not know about it until Mr. Harris told him about it right after he became CFO. I stated earlier, at least I don't want to have sentence disparity between myself and myself in the other cases.

I want to read from Mr. Harris' letter that was sent to me with respect to why the sentence I'm going to impose in this case is going to be less than [31] what Mr. Harris received. He states, "Judge Johnson, Mr. Tad McVay will be coming before you soon for sentencing relating to his role in the HealthSouth fraud case. I reported directly to Mr. McVay during his brief period serving as CFO," and then he puts in parentheses "September through December of 2002."

I think actually Mr. McVay stated at the plea hearing that he became CFO maybe August 27th and was removed early January of 2003. I'm saying that.

Mr. Harris writes as follows:

"Prior to such time I knew very little about him. However, during this brief period I gained a great

deal of respect for him and believed his management decisions during this time were made in the best interest of the shareholders, lenders, and employees of the company.

"Mr. McVay was unaware of the accounting fraud prior to accepting the CFO position. In my opinion, senior executives intentionally did not tell him about the accounting fraud until after he accepted the position. By the time he learned of the fraud, the overstatement of earnings had stopped and true operational earnings were being reported. Mr. McVay repeatedly instructed those of us in the accounting department not to take any orders from executive [32] management that involved inappropriate accounting. There were a couple of times that executive management had the desire to push the envelope, and Mr. McVay stood firm in refusing to do so. This was the first and only time the accounting department was protected from our senior management's ordering of earnings overstatements."

And then he goes on with a personal note about 4 years being difficult for many of the people that were involved in the fraud.

The sentence I'm about to impose is sufficient to protect the public from further crimes of this defendant, not only from this defendant but also from similar defendants, other similar defendants. Moreover, I find that the sentence that I'm about to impose is sufficient but not greater than necessary to comply with the purposes of the factors listed in 18 U.S.C. Section 3553.

I agree with you, Mr. Ingram, it is a serious, serious, serious fraud. I do think there is more—as I have tried to outline in what I have just said, there

are more differences between this defendant and some of the other defendants you mentioned just than his length of tenure as a CFO. It is obvious to me, from reading the guilty plea [33] transcript where Mr. McVay stated to the judge presiding over that, that that was the only act he committed and that he did not know about it until he signed the quarterly report. And from Mr. Harris' statement to the Court in his written letter, Mr. Harris being involved in the fraud, that there is more difference between this defendant and the other defendants in this case who have gotten stiffer sentences.

Therefore, the Court finds that the defendant should be sentenced to a term of 60 months probation on Count I and II to be served concurrently. It is my strong opinion that the sentence imposed is reasonable and appropriate when taking the 5K1.1 departure factors discussed above in consideration with the factors at 3553(a). The extraordinary facts of this defendant's assistance and the facts related to 3553(a) factors justify a substantial variance from the sentencing guideline range as determined with the departure.

While on probation, the defendant is subject to the standard conditions of supervised release on record in this court—and I'm sure they have already been explained to you, but if you need them explained again, I'm sure your probation officer will—and the [34] following special conditions: The mandatory drug testing provisions of U.S.C. Section 3563(a) are waived upon the Court's findings that the offense of conviction is not drug-related and there is no current or past history of substance abuse and there is a low risk of future substance abuse by the defendant.

The second condition: The defendant shall serve 6 months home detention, which may include electronic monitoring, under the administrative supervision of the probation officer. The defendant shall pay the cost of the monitoring unless the probation officer determines that he does not have the ability to do so, and I find that that part of my sentence that I just imposed has already been fulfilled.

With respect to the financial obligations, the defendant is ordered to pay a fine of $10,000, which was previously imposed, and I find as a matter of record that that has been paid. The defendant is ordered to pay an assessment of $200, which is due and payable immediately, and I find as a matter of record that that has already been paid.

Pursuant to 18 U.S.C. Section 3663(a)(c)(3), the Court finds that the number of identifiable victims is so large as to make restitution [35] impractical, and determining complex issues of fact related to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. The defendant is further ordered to forfeit to the United States the sum of $50,000, and I believe that has already been done

MR. INGRAM: That's correct, Your Honor.

THE COURT: To the extent that any of the financial obligations have been met since the time of the original sentence, those amounts are to be applied to the amounts just imposed.

Is there any objection from any party as to the findings of fact, the calculation, the sentence, or the manner in which the sentence was pronounced or

imposed other than those previously stated for the record?

MR. INGRAM: Your Honor, on behalf of the Government, if I understood the Court correctly, the downward departure was to Level 17. Was that the Court's finding?

THE COURT: Yes.

MR. INGRAM: And then based on the substantial variance, the Court imposes probation?

[36] THE COURT: Yes.

MR. INGRAM: The Government, for the record, would like to voice an objection to the sentence, the reasonableness of the sentence.

THE COURT: All right. Anything from you?

THE DEFENDANT: No. Thank you, Your Honor.

THE COURT: Before I actually go to telling you about your right to appeal, which I know you know about, but I have a duty to tell you: For the period of time you have been on probation, that time is credited towards the 60 months that I have just imposed. So you don't have to serve an additional 60 months as of today's date. You are given credit for the time you have already served on probation.

You have a right to appeal the sentence that has just been imposed within 10 days from the date that I sign the judgment—which will be today or Monday; I'm not sure which day it will be—if you believe that the Guidelines have been misapplied or the sentence is otherwise in violation of law. Of course, the Government can appeal it, too. If you are unable to pay the cost of the appeal, then you have a right to petition the Court for permission to proceed with an ap-

peal in forma pauperis and for appointment of counsel. And if that is granted by the Court, upon [37] your request, the clerk of the court will assist you in filing a notice of appeal and counsel will be appointed to represent you.

I don't remember—and I don't have the file in front of me—if there was a waiver of appeal rights in the original plea agreement, but if there is, usually that takes care of your right to appeal unless you feel that the waiver is unenforceable, and you can appeal that issue, of course.

I want to just tell you a couple of things. Mr. Ingram is absolutely right, that it was serious, serious, serious, what you did, and it hurt a lot of people, employees and shareholders, and many, many other people, and your family. He is absolutely right about that. He is also right in pointing out the amount of the losses. It's astronomical amounts.

I am not originally from the United States. I'm originally from Denmark, and I grew up there and practiced law there before I ever came to this country. And I noticed one of the things in this country is in the Declaration of Independence, and we learn about the pursuit of happiness, but the pursuit of happiness is not the pursuit of the almighty dollar. And it seems to me that there is this pursuit of the almighty dollar and there was this pursuit of [38] the almighty dollar climate in HealthSouth when this fraud was going on. And anybody can read the newspaper and see that that happens in other big corporations, too.

Corporate fraud is something that many U.S. Attorneys have had to deal with and many shareholders have lost money on. And I often wonder what you and

other people that were involved with this thought, that more money would make them happier, because it really doesn't. I really don't know what it takes to make people understand that more money does not make people happier. But I can mention example after example of people that have found out the hard way that more money did not make them happier, and that pursuing something recklessly or criminally to get just another dollar, or million, can lead to horrible consequences, which it has for many others.

The irony, as I stated, is that the one person that all of you codefendants in this case, or defendants in this case, were assisting the Government in proceeding a prosecution and conviction of got acquitted, and that's the irony of life, that nothing is—that's just how it was.

My mother passed away recently, about a year ago, and she was almost 102 when she died, and she was [39] a wise woman. And sometimes when people get old, they get frail and they are not the people they were in their heyday. And when I talk about heyday, I'm talking anywhere from 40 to 80, depending on who you are and what kind of genes you have. But I notice that you said at the last sentencing, when you talked about your daughter, about her being an A and you being an F for fraud, and I thought about you being in your heyday, and there is still time to—I thought about what I remembered about my mother —and for that matter my father who died 25 years ago—how I thought about them and what they were like and what example they instilled in me in their heyday, because it's what you end up remembering them for.

You have an opportunity to let your family and the society that you live in and the people that you sur-

round yourself by, and for that matter the shareholders that you have hurt, and for that matter the Government's attorney, you have an opportunity to show that what you are going to be remembered from—and I hope you live to be 102—is not going to be an F for fraud. It's going to be an A for being a model citizen after this.

The Government has done its job, and I respect Mr. Ingram arguing what he has argued. I [40] think it absolutely was very serious, but I think your circumstances are different from many of the other people that have been involved in that and I expressed that in my sentence.

But I wish you well in hoping that your heyday legacy will not be an F, but an A.

MR. FOSTER: Thank you, Your Honor.

THE COURT: This court is adjourned. Thank you to everybody.

MR. FOSTER: If I may, does the Court's credit for probation include all of the probation even after the vacation of the sentence?

THE COURT: Yes, everything.

MR. FOSTER: Everything, up until now?

THE COURT: Yes.

MR. FOSTER: Thank you, ma'am.

(End of proceedings.)